(25)

19/12/07

**HIGH COURT OF CHHATTISGARH AT BILASPUR**

**CRIMINAL APPEAL NO.339 of 2005**

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| **APPELLANT** (In Jail) | : | Gokul Kumar Uikey |
| | ***Versus*** | |
| **RESPONDENT** | : | State of C.G. |

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**J U D G M E N T**

**POST ON 17 DECEMBER 2007**

**Sd/-**
**Dhirendra Mishra**
**Judge**

(26)

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**CRIMINAL APPEAL NO.339 of 2005**

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| **APPELLANT** (In Jail) | : | Gokul Kumar Uikey, S/o Ghasiaram Uikey, age 19 years, R/o. Nakapara Todasi P/S. Dhanora, Distt. Bastar (CG) |
| | ***Versus*** | |
| **RESPONDENT** | : . | State of C.G. through : P.S. Dhanora, Distt. Bastar (CG) |

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Present:

Mr. Pravin Das, counsel for the appellant.

Mr. Sandip Yadav, Dy. Govt. Advocate for the State/respondent.

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**J U D G M E N T**

(17th December 2007)

**Dhirendra Mishra, J**

This criminal appeal is directed against the judgment of conviction and order of sentence dated 11th January 2005 passed in S.T.No.227/04 whereby learned IV Additional Sessions Judge, Bastar at Jagdalpur has convicted the appellant under Section 376(2)(g) and 341/34 of the IPC and sentenced him to undergo RI for ten years and SI for one month respectively. Both the sentences have been directed to run concurrently.

2. Case of the prosecution as per First Information Report is that on 21.1.2004 at about 5.00 p.m. when the prosecutrix was returning from the school with her friend Ku. Savita, appellant Gokul and Shravan caught them in the forest. Savita managed to flee from there, however, both of them took the prosecutrix towards forest where firstly Gokul and thereafter Shravan raped her. While Gokul was committing rape Shravan was holding her hands and legs and while Shravan was committing rape Gokul was holding her. When she tried to shout, she was threatened of life and her mouth was gagged. At that time Santuram reached and both of them fled from there. While she was going with Santuram, she met her father and Punau on way, to whom she narrated about the incident. Thereafter, Panchayat was convened in the village on the next day and First Information Report of Ex.P/1 was lodged on 23.1.2004 at about 11.25 hours.

3. The prosecutrix was sent for medical examination to Block Medical Officer, Keshkal where Dr. Smt. Chandra Rao (PW-4) examined her and gave her report of Ex.P/5. She was also sent for ossification test to Maharani Hospital, Jagdalpur where Dr. Govind Singh (PW-10) examined her and gave his report of Ex.P/11. The appellant was also sent for medical examination and Dr. R.O.P. Pillai examined him and gave his report of Ex.P/11. The wearing apparels i.e. underwear of the prosecutrix and underwear of both the accused persons and vaginal slides of the prosecutrix seized during investigation were sent for chemical examination to Forensic Science Laboratory, Raipur and report of F.S.L. is Ex.P/23.

4. After completing investigation charge sheet was filed against the appellant in the Court of Judicial Magistrate First Class, Kondagaon from where learned Additional Sessions Judge received the case on transfer for trial whereas charge sheet against delinquent juvenile Shravan was filed before the Juvenile Justice Board.

5. During trial the prosecution examined 11 witnesses in all. Thereafter, statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case and pleaded innocence and false implication on account of enmity between village Patte and village Todasi. However, learned trial Court after hearing counsel for the respective parties, convicted and sentenced the accused/appellant as mentioned in paragraph 1 of this judgment.

6. Learned counsel for the appellant submitted that the trial Court on the basis of report of the radiologist has assessed age of the prosecutrix between 12-16 years and further on the basis of statements of the prosecutrix (PW-1), Ku. Savita (PW-2), Santuram (PW-3), Renuram (PW-5) and Punauram (PW-6) has held that the prosecutrix was raped by the appellant. It is further argued that the prosecutrix has claimed that the appellant and co-accused Shravan committed rape with her one by one, as a result of which she sustained abrasions on her back, hands and waist and also sustained internal injuries over her vagina, blood started oozing, the intercourse was painful, her skirt, blouse, underwear were drenched in blood and that when she was examined by the lady doctor bleeding

was there in the vagina etc. but her version is contradicted by the medical evidence as Dr. Smt. Chandra Rao (PW-4) who examined her on 25.1.2004 in her report of Ex.P/6 clearly mentioned that on internal examination she found that labia majora and minora were healthy, there was no sign of rape or recent intercourse. The version of the prosecutrix is further contradicted by the report of F.S.L. in which it has been mentioned that underwear of the prosecutrix, her vaginal slides and underwear of the appellant did not contain human sperm. PW-2 Ku. Savita has also claimed that after the incident she saw that skirt and blouse of the prosecutrix were drenched in blood. The other two witnesses namely Santuram (PW-3) and Ranuram (PW-5) have not seen the incident and they have only stated that the appellant was outraging the modesty of the prosecutrix. She has made material improvements in her statement before the Court from her diary statement of Ex.D/1 and FIR.

7. Reliance is placed on the judgment in the matter of **Ghosa Ban Singh and etc. Vs. State of Bihar** reported in **2004 Cri.L.J. 569**.

8. On the other hand, learned counsel for the State/respondent supported impugned judgment of the trial Court and placed reliance on the judgments in the matters of **Aman Kumar and another Vs. State of Haryana**, **2004 AIR SCW 827** and **Madan Gopal Kakkad Vs. Naval Dubey and another**, **1992 JLJ 377**.

9. I have heard learned counsel for both the parties and have perused the material available on record as also the impugned judgment.

10. Conviction of the appellant is based on the statements of the prosecutrix (PW-1), Ku. Savita (PW-2) and Santuram (PW-3). It is also based on the statements of her father Renuram (PW-5) and Punauram (PW-6).

11. In substance, the evidence of the prosecutrix is that she was the student of Class-VII on the date of incident. While she was returning from the school at about 5.00 p.m. on foot with her friend Savita, all of a sudden the appellant and co-accused Shravan appeared and caught them on way. Gokul caught the prosecutrix whereas Savita was caught by Shravan. However, Savita managed to

flee from there, both of them dragged the prosecutrix towards forest and thereafter, committed rape with her turn by turn. Both of them facilitated each other by holding her hands and legs in committing rape. She has also claimed that as a result of forcible sexual intercourse she sustained abrasions on both of her hands, waist and back and she was left only when the accused persons saw Santuram coming there. She has also claimed that her skirt, blouse and underwear were drenched in blood and bleeding continued from her private part even at the time of her medical examination by the doctor and she was feeling pain. On the contrary, Dr. Smt. Chandra Rao (PW-4) in her report has specifically stated that she did not notice any external or internal injuries on the person of the prosecutrix and found that hymen of the prosecutrix was intact. The doctor has also not mentioned that the prosecutrix was complaining any pain at the time of examination.

12. PW-2 Savita has also stated that the incident took place at 5.00 p.m. The accused persons were hiding on the way and when she was returning from the school with the prosecutrix, all of a sudden they caught them from behind. However, she could manage to flee from there by pushing Shravan who had caught her. Thereafter, both of them caught the prosecutrix. She narrated about the incident to Renuram, Punauram, Lakhmuram and mother of the prosecutrix. Panchayat was convened in the village on the next day. In reply to the leading question put by the prosecution she admitted that the prosecutrix told her that both the accused persons raped her in turn. She has also stated that when the prosecutrix came to meet her in the evening, her skirt and blouse were stained with blood and skirt was drenched in blood. She recognized the accused persons since before.

13. PW-3 Santuram has deposed that he saw appellant Gokul doing wrong things with the prosecutrix in the forest that falls between village Todasi and Padde. He was going on foot. On seeing him, Gokul left the prosecutrix and fled from there. Accused Shravan was sitting on the leg side of the prosecutrix. Thereafter, he brought the prosecutrix to the village and she told him that both the accused persons did wrong things to her. While he was coming with the prosecutrix towards home, he met Punauram and Renuram on way.

Thereafter, he and father of the prosecutrix narrated about the incident to father of Gokul in his house. Some omissions and contradictions in his diary statement of Ex.D/3 regarding having witnessed Gokul doing wrong things with the prosecutrix etc. have been pointed out.

14. PW-5 Renuram – father of the prosecutrix and PW-6 Punauram are witnesses of the fact that the prosecutrix narrated about the incident to them immediately after the incident and thereafter Panchayat was convened in the village in relation to the same incident.

15. In the matter of *Ghosa Ban Singh* (supra) the accused persons four in number forcibly took the prosecutrix, a 17 year-old-girl, towards the school after intimidating her and out of fear she went with them. Thereafter, all of them raped her one after the other. In the meantime, their three friends also came there and they also ravished her. The High Court considering the total absence of corroboration to her testimony, absence of any injury on vulva and vagina and that medical evidence was not in conformity with the manner of ravishment as deposed by the informant, acquitted the appellants by extending them benefit of doubt with an observation that the defence version of false implication cannot be ruled out.

16. In the matter of *Aman Kumar* (supra) two accused persons caught the prosecutrix near field and forcibly raped her after shutting her mouth with her *chunni*. On return she narrated about the incident to her mother, who described the incident to a member of the Panchayat and thereafter, report was lodged after two days. In this case, it has been held that to constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. Paragraph 7 of the above judgment is being reproduced hereunder:

> *"7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the*

*virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See Joseph Lines IC & K 893). It is well-known in the medical world that the examination of smegma loses all importance after twenty four hours of the performance of the sexual intercourse. [See Dr. S.P. Kohli, Civil Surgeon, Ferozepur Vs. High Court of Punjab and Haryana thr. Registrar, (1979) 1 SCC 212]. In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Evan a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence or rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen is positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376, IPC.*

17. In the matter of *Madan Gopal Kakkad* (supra) the prosecutrix was the student of third standard, she used to go frequently to the

house of the accused to play with her friend Richa. On the date of incident the accused bolted the door of the room from inside where he and the prosecutrix were alone. He completely stripped off himself, removed the undergarments of the prosecutrix and thereafter, slightly inserted his penis into her vulva. The matter was narrated by the prosecutrix to her mother and ultimately, the matter was reported to the police after 2-3 days. On medical examination abrasion and reddishness on labia majora and minora respectively, were found and the doctor opined that from the above finding it seems that an attempt to rape has been made. The Hon'ble Supreme Court referring to *Modi's Medical Jurisprudence and Toxicology (Twenty First Edition)* has held in paragraph 38 of the above judgment as under and convicted the accused u/s 376 of the IPC:

> *"38. Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."*

18. In the present case, the prosecutrix version in the Court was of rape by two accused persons. She has claimed complete penetration by both the accused persons and has also claimed that as a result of penetration blood started oozing from her private part and her skirt, underwear and blouse were drenched in blood. She has further claimed that she sustained numerous abrasions over her wrists, waist, hands and back. The above version of the prosecutrix stands contradicted by the medical evidence which is at complete variance, though she was examined after four days of the incident. The prosecutrix has claimed that even on the date of her medical examination, there was slight bleeding from her vagina but the lady doctor who has examined her, has not noticed any external or

internal injury or bleeding over person of the prosecutrix. On the contrary, she has stated that labia majora and minora of the prosecutrix were healthy, the hymen was intact and there was no sign of rape or recent sexual intercourse on her person. In the instant case, absence of any injury in the labia majora and opinion of the doctor that labia majora and minora were healthy at the time of examination, negatives the possibility of slightest penetration also.

19. It is true that the prosecutrix complaining of having been a victim of the offence of rape, is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. However, in the instant case it is very difficult to accept the version of the prosecutrix on its face value as her version is contradicted by the medical evidence in material particulars. She has claimed that she has been ravished by two accused persons on the ground, as a result of which she sustained numerous abrasions on her person, however, the medical evidence totally contradicts her testimony. Moreover, her testimony also fails to inspire confidence as the F.S.L. report regarding presence of human sperm or blood on the underwear of the prosecutrix and the appellant and her vaginal slides is also negative.

20. Learned counsel for the State/respondent argued that there is a clear evidence of attempt to commit rape. Apart from the prosecutrix, PW-2 Savita is a witness of the fact that both the accused persons dragged the prosecutrix towards forest and PW-3 Santuram has himself seen the appellant lying over the prosecutrix and doing wrong things to her. In the matter of *Aman Kumar* (supra) while dealing with attempt to commit rape, it has been held that in every crime, there is first, intention to commit, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime in complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. In the present case, there is evidence that both the accused persons were waiting for the prosecutrix and her friend in the forest, as soon as they reached there, both of them pounced upon them, dragged the prosecutrix towards the forest and after undressing her firstly Gokul made an attempt in the presence of Shravan and

thereafter, Shravan made an attempt in the presence of Gokul. Thus intention of the accused persons, their preparation to commit the offence and thirdly, their attempt to commit it, have been established from the statements of the prosecutrix and her friend Sunita (PW-2).

21. However, in the absence of reliable evidence of slightest penetration, we have already held that evidence of the prosecutrix that she was subjected to rape by the appellant does not inspire confidence. But, we have no hesitation to hold that the appellant unsuccessfully attempted to commit rape with the prosecutrix and as such, act of the appellant constitutes an offence punishable under Section 376 (2)(g) read with Section 511 of the IPC. So far as conviction of the appellant under Section 341/34 of the IPC is concerned, in view of the evidence available on record, the same does not call for interference.

22. In the result, the appeal is partly allowed. Conviction and sentence of the appellant under Section 341/34 of the IPC is maintained. However, conviction of the appellant under Section 376(2)(g) of the IPC is altered to Section 376(2)(g) read with 511 of the IPC and in place of 10 years' RI he is sentenced to undergo RI for 5 years.

**Sd/-**
**Dhirendra Mishra**
**Judge**

**17.12.2007**